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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EBAY, INC., Plaintiff, v. DIGITAL POINT SOLUTIONS, INC., SHAWN HOGAN, KESSLER'S FLYING CIRCUS, THUNDERWOOD HOLDINGS, INC., TODD DUNNING, DUNNING ENTERPRISE, INC., BRIAN DUNNING, BRIANDUNNING.COM, and Does 1-20, Defendants.	Case No. CV 08-04052 JF PVT **DEFENDANTS DIGITAL POINT SOLUTIONS, INC. AND SHAWN HOGAN'S NOTICE OF MOTION AND MOTION TO TRANSFER; MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT THEREOF [28 U.S.C. §1404(a)]** Date: June 26, 2009 Time: 9:00 a.m. Dept.: Courtroom 3

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on June 26, 2009 at 9:00 AM, or as soon thereafter as the matter can be heard in Courtroom 3 of the United States District Court for the Northern District of California, located at 280 South 1st Street, San Jose, California 95113, defendants DIGITAL POINT SOLUTIONS, INC. and SHAWN HOGAN (the "DPS Defendants") will move this Court for an order transferring the above-captioned action to the United States District Court for the Central District of California pursuant to 28 U.S.C. §1404(a) based on convenience grounds and the interests of justice.

The DPS Defendants seek the following specific relief:

In the alternative to dismissal of the action per the DPS Defendants' pending Motion to Dismiss Plaintiff's Second Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), the DPS Defendants seek to transfer this action to the United States District Court for the Central District of California on convenience grounds, the interests of justice, and based on the forum selection clause set forth in the Commission Junction Publisher Service Agreement.

The DPS Defendants hereby request that the Court take judicial notice of its entire case file in this matter, including Plaintiff's initial pleadings, the briefing of the parties on the defendants' initial motions to dismiss, and the Court's February 24, 2009 order thereon.

The motion will be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities set forth below, the accompanying Declaration of Ross M. Campbell and exhibits thereto, the foregoing request for judicial notice, the records and file herein, and upon such other oral and documentary evidence as may be presented at the hearing on this motion.

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MEMORANDUM OF POINTS & AUTHORITIES

Defendants Digital Point Solutions, Inc. and Shawn Hogan (collectively, the DPS Defendants)[1] respectfully submit the following Memorandum of Points & Authorities in support of their Motion to Transfer this action to the United States District Court for the Central District of California:

I. SUMMARY OF MOTION

This action should be transferred to the Central District pursuant to 28 U.S.C. §1404(a) based on the forum selection clause set forth in the Commission Junction Publisher Service Agreement (PSA), the convenience of the parties and witnesses, and the interests of justice.[2] Indeed, in ruling on Defendants' initial motions to dismiss, the Court already concluded that Plaintiff is bound by the forum selection clause set forth in the PSA.[3] And as explained below, the unsupported allegations in the Second Amended Complaint (SAC) regarding the applicability of the User Agreement are insufficient to change that determination. The motion should be granted for the following reasons:

One. The interests of justice warrant transfer because the PSA contains an express forum selection clause designating Los Angeles as the exclusive forum for resolving disputes relating to the affiliate marketing program. Further, the Court has already concluded that Plaintiff is bound by the forum selection clause as a third-party beneficiary of the PSA and has noted that §1404(a) is the appropriate procedural mechanism for effectuating transfer pursuant to the same. Likewise, Plaintiff incorporated the terms of the PSA into its "eBay Affiliate Program - Supplemental Terms and Conditions" (the "T&C Supplement"). Plaintiff therefore agreed in advance that Los Angeles County is the appropriate forum for adjudicating this dispute.

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[1] The remaining defendants are collectively referred to herein as the "Non-DPS Defendants," and where applicable, all defendants in this action are collectively referred to as "Defendants."

[2] The DPS Defendants have separately moved to dismiss this action pursuant to the one-year limitations period set forth in the PSA. Via the present motion, the DPS Defendants move, in the alternative, to transfer this action to the Central District as set forth herein. The hearing on the present motion has been jointly set and noticed with the hearing on the motion to dismiss.

[3] Pursuant to the Federal Rules of Evidence, Rule 201, the DPS-Defendants request that the Court take judicial notice of its entire case file in this matter, including Plaintiff's initial pleadings, the briefing of all parties on the Defendants' initial and subsequent motions to dismiss, and the Court's order, dated February 24, 2009 (hereinafter, the "Order on Motions to Dismiss").

Two. With respect to the allegations of the SAC, Plaintiff has not cured (and cannot cure) the specific deficiencies outlined by the Court in its prior ruling. In that regard, the Court found that "the FAC does not explain how violation of the user agreement is unrelated to the alleged breach of the PSA or why the PSA should not be considered the primary and controlling agreement for all claims related to the PSA." As detailed below, Plaintiff's generic User Agreement simply does not apply to the present dispute and the SAC's allegations to the contrary should be disregarded. In an attempt to plead around the express terms of the PSA and T&C Supplement, the SAC repeatedly alleges that the User Agreement is the controlling document in this case. However, there is no question that the direct purpose of the PSA, in conjunction with the T&C Supplement, is to set forth the terms under which Plaintiff's affiliate marketing program will be administered. As such, there is no basis to conclude that the generic User Agreement, which applies to any person visiting eBay's website, should somehow control over those direct provisions.

Three. The relevant §1404(a) factors weigh heavily in favor of transferring the action to the Central District. Indeed, under relevant case law, the forum selection clause should be treated as a "manifestation of the parties' preferences" for the appropriate forum and is "determinative" with respect to convenience issues. In addition, Plaintiff established direct contacts with the Central District when it contracted with Commission Junction to administer the affiliate marketing program from that forum. Moreover, the deference normally afforded to the plaintiff's choice of forum does not apply in this case and Plaintiff will be unable to meet its burden in convincing the Court that countervailing interests should preclude a transfer of this action to the agreed upon forum; and

Four. The requested transfer is in the interests of justice, as the Central District of California would provide an alternate and viable forum to adjudicate the parties' rights.

II. STATEMENT OF FACTS

Plaintiff operates an affiliate marketing program to increase traffic to its on-line trading forum. (SAC ¶¶18, 19). Affiliates receive commissions for directing business to Plaintiff's website. (SAC ¶19). Plaintiff, and/or its agent, Commission Junction, tracks which affiliates are entitled to commissions through the use of "cookies" - digital tags that store information in the user's browser. (SAC ¶¶19, 21). At all relevant times, Plaintiff used the services of Commission Junction in administering the affiliate program. (SAC ¶20).

Commission Junction contracts directly with each affiliate via its "Commission Junction Publisher Service Agreement" (the "PSA") (*See* Decl. of Ross M. Campbell, Ex. 1). The PSA is a form contract applicable to all affiliate programs administered by Commission Junction; it refers to the entities that operate such programs as "Advertisers" and to the respective affiliates as "Publishers." (PSA, intro., p. 1). To participate in Plaintiff's affiliate program, potential affiliates must enter into the PSA as well as Plaintiff's form contract, the "eBay Affiliate Program - Supplemental Terms and Conditions" (the "T&C Supplement"), which sets forth additional terms applicable to Plaintiff's particular program. (*See* Decl. of Ross M. Campbell, Ex. 2).

The opening paragraph of the T&C Supplement provides:

> In consideration of Your participation in the Affiliate Program (the "Program") maintained by eBay Inc. ("eBay") through Commission Junction, Inc. ("CJ"), You agree to comply with these Supplemental Terms and Conditions ("Terms and Conditions") in addition to the terms of the Commission Junction Publisher Service Agreement ("PSA"). If any of these Terms and Conditions conflict with those of the PSA, then these Terms and Conditions will control. Capitalized terms not defined herein have the meanings set forth in the PSA. (*Id.* at p. 1).

Thus, together, the PSA and T&C Supplement set forth the contractual relationship between Plaintiff and its affiliates, and to the extent the documents do not conflict, the terms of the PSA expressly control. In that regard, the T&C Supplement defers to the PSA with respect to a broad range of provisions, including the PSA's forum selection clause, which states:

> The exclusive forum for any actions related to this Agreement shall be in the state courts, and, to the extent that federal courts have exclusive jurisdiction, in Los Angeles, California. (PSA, §9(d); emphasis added).

Regarding the present dispute, the SAC alleges that as members of Plaintiff's affiliate program, Defendants engaged in a fraudulent "cookie stuffing" scheme through which Defendants received commissions to which they were not entitled. Plaintiff initially filed suit on August 25, 2008, and filed a First Amended Complaint (FAC) on October 7, 2008. In response, all Defendants moved to dismiss under Rule 12(b)(6) and, based on the forum selection clause set forth above, the Non-DPS Defendants further moved to dismiss for improper venue under Rule 12(b)(3). In ruling on the venue issue, the Court reviewed the opening paragraph of the T&C Supplement and concluded as follows:

> This language in the T&C Agreement, when read together with eBay's own allegations in the FAC with respect to the role of the PSA, indicates that eBay is a third-party beneficiary of the PSA. Pursuant to the PSA, advertising affiliates earn revenue by "promoting Advertisers," including eBay. *See* PSA at 1. Indeed, the T&C Agreement appears expressly to incorporate the terms of the PSA. [Citation]. (Order on Motions to Dismiss, p. 7:6-13; emphasis added).

As such, the Court further concluded:

> [Plaintiff] has failed to present sufficient allegations as to why it is not bound by the forum selection clause contained in the PSA. The Central District of California and/or the Los Angeles Superior Court would provide an alternate and viable forum to bring claims against the Non-DPS Defendants." (*Id.*, p. 7:21-24; emphasis added).

The Court afforded Plaintiff the opportunity to amend, however, because Plaintiff contended at oral argument that a separate User Agreement supersedes the terms of the PSA. (*Id.*, p. 7:14-15). The Court also noted that §1404(a) is the appropriate procedural mechanism for effectuating transfer based on a forum selection clause. (Order on Motion to Dismiss, p. 12:21-28, fn. 7).

Although a copy of the User Agreement is not attached to the SAC, Plaintiff continues to assert that the User Agreement supersedes the PSA and T&C Supplement. Plaintiff now alleges that each cause of action set forth in the SAC arises out of violations of the User Agreement, and further contends that the PSA and T&C Supplement do not apply because neither document authorized access to Plaintiff's website in any manner. (SAC ¶¶26, 38).

III. LEGAL STANDARD AND SCOPE OF REVIEW

"For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. §1404(a).[4] A motion for transfer pursuant to §1404(a) lies within the discretion of the district court and depends on the facts of each particular case. *Jones v. GNC Franchising, Inc*. (9th Cir. 2000) 211 F.3d 495, 498. The Court must consider both public factors, which go to the interests of justice, and private factors, which go to the convenience of the parties and witnesses. *See Decker Coal Co. v. Commonwealth Edison Co.* (9th Cir. 1986) 805 F.2d 834, 843.

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[4] Here, the action could have been brought in the proposed transferee district pursuant to 28 U.S.C. §1391(b)(1) because there is no dispute that all Defendants reside within the State, and the Non-DPS Defendants reside/conduct business in the Central District (Orange County). The action could have been further brought in the Central District because, as discussed below, Commission Junction administered the program and issued affiliate payments within that forum. *See* 28 U.S.C. §1391(b)(2) (venue proper where a substantial part of the events giving rise to the alleged claim occurred).

Such factors include: (1) the location where the relevant agreements were negotiated and executed; (2) the state that is most familiar with the governing law; (3) the plaintiff's choice of forum; (4) the parties' respective contacts with the forum; (5) the contacts relating to the plaintiff's cause of action in the chosen forum; (6) the differences in the costs of litigation in the two forums; (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses; (8) the ease of access to sources of proof; (9) the presence of a forum selection clause; and (10) the relevant public policy of the forum state, if any. *Jones*, 211 F.3d at 498-99.

Generally, the moving party bears the burden of showing that transfer is appropriate. *Id.* at 499. However, as this Court has noted, §1404(a) is an appropriate procedural mechanism for transfer based on a forum selection clause. (Order on Motion to Dismiss, p. 12:21-28, fn. 7, *citing Digital Envoy, Inc. v. Google, Inc.* (N.D. Ga. 2004) 319 F. Supp. 2d 1377, 1378-79). And "while the application of a valid forum selection clause is not dispositive in considering a motion to transfer under §1404(a). . ., 'the opponent bears the burden of persuading the court that the contractual forum is sufficiently inconvenient to justify retention of the dispute.' [Citation]." *Digital Envoy, supra,* 319 F. Supp. 2d at p. 1381.[5]

Moreover, "[a] forum selection clause is determinative of the convenience to the parties" and is entitled to "substantial consideration." *Unisys Corp., supra,* U.S. Dist. LEXIS 31897 at 12 (emphasis added). "When considering private interests, a court may treat a forum selection clause 'as a manifestation of the parties' preferences as to a convenient forum.'" *Rowsby v. Gulf Stream Coach, Inc.* (CD Cal. 2009) 2009 U.S. Dist. LEXIS 40046, 10. "Thus, while the courts are traditionally deferential to a plaintiff's forum, 'such deference is inappropriate where the plaintiff has already freely contractually chose[n] an appropriate venue.' [Citation]." *Id.* (emphasis added).

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[5] *See also Unisys Corp. v. Access Co.* (ND Cal. 2005) 2005 U.S. Dist. LEXIS 31897, 13 ("the plaintiffs bear the burden of demonstrating why they should not be bound by their contractual choice of forum."); *Stonehenge, Ltd. v. Garcia* (SDNY 1998) 989 F.Supp. 539, 540 ("a party resisting transfer to a forum designated in its contract must demonstrate 'exceptional facts' indicating that transfer would be inappropriate.").

IV. ARGUMENT

A. Plaintiff is Bound by the Forum Selection Clause Set Forth in the PSA Because Plaintiff's Generic User Agreement Does Not Apply.

As noted above, in ruling on the initial motions to dismiss, the Court concluded that Plaintiff is bound by the PSA's forum selection clause because Plaintiff is a third-party beneficiary of the PSA, and because the T&C Supplement appears to expressly incorporate the PSA's terms. (Order on Motions to Dismiss, p. 7:6-10). In doing so, the Court identified a number of specific deficiencies in the FAC, as follows:

> [T]he FAC does not explain how violation of the user agreement is unrelated to the alleged breach of the PSA or why the PSA should not be considered the primary and controlling agreement for all claims related to the PSA. (*Id.* at 7:17-18; emphasis added).

Per the discussion that follows, Plaintiff has not (and cannot) cure this deficiency because there is no question that the PSA and T&C Supplement are directly applicable to the harms alleged in the SAC.

1. The PSA and T&C Supplement Control Because they Expressly Set Forth the Terms under which the Affiliate Marketing Program will be Administered.

Throughout the SAC, Plaintiff attempts to allege the applicability of Plaintiff's general "User Agreement" over the more specific terms of the PSA and T&C Supplement. (*See e.g.*, SAC ¶¶26, 33, 38). For instance, the SAC alleges, "Each of the causes of action set forth herein arises out of [Defendants'] violations of the User Agreement." (SAC ¶26). However, Plaintiff has not attached a copy of the User Agreement to the SAC or otherwise set forth the particular terms that are alleged to apply. As such, the Court need not accept the allegation as true and should disregard it as conclusory.

Further, there is no question that the direct purpose of the PSA, in conjunction with the T&C Supplement, is to set forth the terms under which Plaintiff's affiliate marketing program will be administered. Indeed, both documents contain express provisions addressing the types of harms alleged in the SAC. For instance, the T&C Supplement provides:

> You will not deliver any eBay-related cookies or other tracking tags to the computers of users that are merely viewing Your advertisements or while Your applications are merely active or open. [¶] . . . To qualify as a payable transaction, a user must take an affirmative action, clicking on your properly-coded link in a browser or browser environment. (T&C Supp., ¶¶3,4; emphasis added).

Similarly, the PSA states:

> You must promote Advertisers such that You do not mislead the Visitor, and such that the Links deliver bona fide Transactions by the Visitor to Advertiser from the Link. You shall not cause any Transactions to be made that are not in good faith, including, but not limited to, using any device, program, robot, lframes, or hidden frames. (PSA, §1(d)(ii); emphasis added).

Given the above, Plaintiff's claims that the User Agreement supersedes the terms of the PSA and T&C Supplement are entirely unfounded. And because the foregoing provisions are directly applicable,[6] Plaintiff cannot show how any purported "violation of the user agreement is unrelated to the alleged breach of the PSA . . ." (Order on Motion to Dismiss, p. 7:16).

2. Plaintiff's Allegations regarding the Applicability of the User Agreement are Directly Contradicted by the Terms of the PSA and T&C Supplement.

In an apparent attempt to cure the deficiencies previously identified by the Court, Plaintiff contends as follows:

> The User Agreements were the *only basis* on which any Defendant had authorization to access eBay's site. No agreement entered into by any Defendant in connection with eBay's Affiliate Marketing Program, including but not limited to any Publisher Service Agreement that may have been entered into between CJ and one or more of Defendants and/or any Terms and Conditions of the Affiliate Marketing Program agreed to by one or more of Defendants, provides for or *in any way contemplates such access*. (SAC ¶38; emphasis added).

The SAC further alleges, "The only authorization given to the Defendants to access eBay's site *in any manner* was by way of eBay's User Agreement." (SAC ¶26; emphasis added). These contentions are disingenuous at best and should not be well taken, as the PSA expressly states:

> [*T*]*he Advertiser is granting to You the right to display and Link to the Advertiser's Web site or Web site content* in accordance with the Advertiser's Program Terms for the limited purposes of Promoting the Advertiser's Program, subject to the terms and conditions of this Agreement." (PSA, §4(a); emphasis added).[7]

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[6] The SAC alleges that Defendants used software programs or code that redirected users to Plaintiff's website without the users realizing it or affirmatively clicking on any referring link. (*See* SAC ¶¶24-27).

[7] Here, the PSA clearly defines "Program" as the affiliate marketing program, and the phrase "Program Terms" refers to the particular Advertiser's affiliate program terms - in this case, the T&C Supplement. (PSA, intro., §1(b)).

As noted above, the PSA and T&C Supplement are in fact directly applicable, and Plaintiff's attempt to avoid the legal consequences of its own form contract should be rejected. Per the SAC, any person that visits the eBay website automatically becomes a party to the User Agreement as a consequence thereof. (SAC §26). Given this incredibly generic application, there is no basis to conclude that the User Agreement should control the discrete "cookie stuffing" allegations set forth in the SAC. *See* Cal. Code Civ. Proc. §1859 (reciting basic interpretational tenet that "a particular intent will control a general one that is inconsistent with it.").[8] Indeed, if Plaintiff's contentions were to be accepted, the PSA and T&C Supplement would never apply.

Based on the foregoing, there can be no question that the User Agreement is inapplicable to this dispute, and the PSA and T&C Supplement expressly control. As such, the PSA's forum selection clause must be given primary consideration in evaluating the relevant §1404(a) factors.

B. The Court Should Transfer This Action to the Central District Based on the Convenience of the Parties and Witnesses, and in the Interests of Justice.

Per the discussion that follows, the relevant §1404(a) factors either (i) weigh heavily in favor of transferring this action to the Central District of California, or (ii) are inapplicable to the present dispute.

1. Private Factors Weigh Heavily in Favor of Transfer.

As noted above, in considering a §1404(a) motion to transfer, the courts consider both public factors, which go to the interests of justice, and private factors, which go to the convenience of the parties and witnesses. *See Decker Coal Co. v. Commonwealth Edison Co.* (9th Cir. 1986) 805 F.2d 834, 843. Private factors have included the plaintiff's choice of forum, where the claim arose, the convenience of the parties in light of their conditions, and the location of books and records. *Rowsby v. Gulf Stream Coach, Inc.* (CD Cal. 2009) 2009 U.S. Dist. LEXIS 40046, 10. "When considering private interests, a court may treat a forum selection clause 'as a manifestation of the parties' preferences as to a convenient forum.'" *Id.* (emphasis added).

As a preliminary matter, per the forum selection clause set forth in the PSA, "Plaintiff already agreed to [Los Angeles County] as an appropriate venue." *Id.* Because the clause therefore constitutes a "manifestation of the parties' preferences" as to the appropriate forum for adjudicating this dispute, the Court should find that the each of the private interest factors weigh in favor of transferring the action to the Central District of California. *See id.* This point is further illustrated in the following sections.

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[8] Also of note, the PSA contains an integration clause which has also been incorporated into the T&C Supplement by reference. (PSA, §9(i)). Accordingly, any contrary terms in the User Agreement cannot be considered.

a. *Plaintiff's Choice of Forum*

With respect to the first private factor, Plaintiff's choice of forum is not entitled to judicial deference because the PSA establishes Los Angeles County as the exclusive forum for adjudicating disputes related to the affiliate marketing program. *See Rowsby, supra,* U.S. Dist. LEXIS 40046 at 10 (deference to plaintiff's forum "inappropriate" where plaintiff has already freely chosen appropriate venue by contract). As the Court noted in ruling on the initial motions to dismiss, Plaintiff "has failed to present sufficient allegations as to why it is not bound by the forum selection clause contained in the PSA. The Central District of California and/or the Los Angeles Superior Court would provide an alternate and viable forum to bring [its] claims . . . [Citation]." (Order on Motion to Dismiss, p. 7:21-24; emphasis added). Because there is no basis to conclude that the User Agreement (or any forum selection clause set forth therein) supersedes the terms of the PSA, the deference normally afforded to the plaintiff's selected forum does not apply in this case.

b. *Convenience of the Parties*

Regarding convenience of the parties, it is undisputed that all Defendants reside or are located in Southern California - in Orange County and San Diego County, respectively. It is likewise undisputed that Plaintiff is a Fortune 500 company that conducts business on a global scale. Moreover, with respect to the affiliate marketing program, Plaintiff deliberately established contacts with the Central District when it contracted with Commission Junction to administer the program on its behalf. As such, Plaintiff cannot now complain that the Central District would constitute an inconvenient forum to litigate the present dispute, particularly where the specific harms alleged in the SAC arise directly under the PSA and T&C Supplement.[9] Based on the foregoing and the lack of deference to be afforded to Plaintiff's

[9] *See e.g.* PSA, §1(d)(ii) (requiring delivery of "bona fide Transactions by the Visitor to Advertiser from the Link."); *see also* T&C Supp., ¶¶3,4 (prohibiting use of cookies and other tracking methods with respect to users that are merely viewing advertisements).

selected forum, this factor weighs heavily in favor of transferring the action to the Central District. And to the extent any question remains, the forum designated in the PSA must be treated as "determinative of the convenience to the parties." *Unisys Corp. v. Access Co.* (ND Cal. 2005) 2005 U.S. Dist. LEXIS 31897, 12 (emphasis added).

c. *Convenience of Non-Party Witnesses*

With respect to this issue, Commission Junction will constitute the primary source of non-party witnesses in this action. Per the SAC itself, Commission Junction played a critical role in administering Plaintiff's affiliate marketing program:

> At all relevant times, eBay used the services of CJ, a subsidiary of ValueClick, Inc., in administering the Affiliate Marketing Program. The relationship between eBay and CJ was governed at all relevant times by various Advertiser Service Agreements. Under those Agreements, CJ was responsible for, among other things, recruiting affiliates, tracking affiliate traffic, monitoring compliance by affiliates, preventing and detecting fraudulent activity, and paying affiliates using funds remitted by eBay." (SAC ¶20; emphasis added).

Thus, per the allegations in the SAC, Commission Junction employees will have relevant knowledge and information in terms of program-compliance and affiliate compensation. Relevant here, Commission Junction's headquarters and normal places of business are located in Santa Barbara and Westlake Village, California, both of which are located within the Central District. (SAC ¶29).[10] Specifically, Commission Junction performed the above-referenced monitoring services in Santa Barbara County (SAC ¶29) and issued payments to affiliates from its offices in Los Angeles County. (Presiado Decl., Ex. 8, ¶6). Indeed, it appears that in litigating the prior state court action against the Non-DPS Defendants, Commission Junction identified 24 current or former employees having information related to potential program-compliance issues.[11] Not surprisingly, it appears that all but three of those witnesses were identified as residing in Southern California. (Foreman Decl. ¶10).

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[10] *See* Declaration of Leo J. Presiado in Support of Motion to Dismiss Plaintiff's Second Amended Complaint by Defendants Kessler's Flying Circus, et al. (Presiado Decl.), Ex. 8 - setting forth Commission Junction's operative pleading in the prior state court action against the Non-DPS Defendants. Therein, Commission Junction alleges that "[a]t all relevant times herein mentioned, CJI's headquarters and principal place of business was in Westlake Village, California." *See* ¶6.

[11] *See* Declaration of Stewart H. Foreman in Support of Defendants Todd Dunning and Dunning Enterprise, Inc.'s Motion to Dismiss Second Amended Complaint and to Transfer Venue (Foreman Decl.), ¶10).

Moreover, Commission Junction has already spoken on this issue through the PSA. Because Commission Junction is a direct party to the PSA (and therefore agreed to the forum designated therein), Commission Junction has already indicated that Los Angeles County is the appropriate forum for adjudicating disputes related to Plaintiff's affiliate marketing program. In that regard, the Court should treat Commission Junction's manifested preference as equally determinative on the convenience issue.

d. *Location of Books and Records*

This factor will be largely neutral as relevant documents and records will likely be present in both fora. However, given Commission Junction's admitted role in administering the program, monitoring traffic, and issuing affiliate payments, the primary non-party source of relevant information will be located in the Central District. As such, this factor also favors transfer to the Central District.

2. Public Factors are Largely Inapplicable in this Case.

The public factors considered by the courts have included the enforceability of the judgment, considerations that could make the trial expeditious, deciding local controversies at home, and the public policies of the forum. *Rowsby v. Gulf Stream Coach, Inc.* (CD Cal. 2009) 2009 U.S. Dist. LEXIS 40046, 9. These factors primarily relate to interstate transfers and are not implicated in this case. For instance, because all parties reside or are located in California, concerns regarding the enforceability of the judgment, familiarity with local law, and the need to decide local controversies in a particular state, will not apply. Likewise, the DPS Defendants are not aware of any facts or circumstances that would significantly expedite the trial of this matter in one forum as opposed to the other. However, the fact that the action is still in the relatively early stages of the proceedings favors transfer.

3. Transfer Will Further the Interests of Justice.

As discussed above, the private/convenience-related factors weigh heavily in favor of transferring the action to the Central District of California while the public-related factors remain largely inapplicable. As such, the requested transfer is clearly appropriate and Plaintiff will be unable to satisfy its heavy burden "of persuading the court that the contractual forum is sufficiently inconvenient to justify retention of the dispute." *Digital Envoy, Inc. v. Google, Inc.* (N.D. Ga. 2004) 319 F. Supp. 2d 1377, 1378-79. Moreover, the requested transfer is in the interests of justice, as Plaintiff already agreed to litigate affiliate-related disputes in Los Angeles County, and the Central District will provide an alternate and viable forum to adjudicate the parties' rights.

V. CONCLUSION

For the foregoing reasons, as an alternative to the relief sought per the DPS Defendants' pending motion to dismiss, the DPS Defendants respectfully request that this action be transferred to the United States District Court for the Central District of California pursuant to §1404(a).

DATED: May 22, 2009

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